

## Communications and Technology Subcommittee Hearing: "Legislative Proposal To Sunset Section 230 of The Communications Decency Act"

Testimony of Kate Tummarello Executive Director, Engine May 22, 2024

Chairs McMorris Rodgers and Latta, ranking members Pallone and Matsui, members of the subcommittee, thank you for the invitation to testify before you today. My name is Kate Tummarello, and I am the Executive Director of Engine, a non-profit that works with thousands of startups across the country to advocate for pro-startup, pro-innovation policies. I appreciate the opportunity to discuss the importance of Section 230 to a diverse ecosystem of Internet platforms, especially those run by startups.

Section 230 works for Internet platforms of all types and sizes and, more importantly, their users. Sunsetting the law—especially in a little over 18 months without consensus around an alternative framework—risks leaving Internet platforms, especially those run by startups, open to ruinous litigation, which ultimately risks leaving Internet users without places to gather online. As just one example, consider a startup in Engine's network that operates a review platform for people to share information about how accessible public spaces are.<sup>1</sup>

In talking about why Section 230 works and what's at stake if it is sunset, I want to quickly run through what it is not. It is not a get of jail free card; and it is not a special protection for large social media companies. It is a faster, more efficient way to reach an inevitable legal conclusion: that Internet platforms shouldn't be punished in court for the speech and conduct of their users that the platforms can't logically be expected to know about. And that means private litigants can't use the threat of drawn out and expensive legal battles to pressure Internet platforms into removing user speech the litigants don't like. In the example of the accessibility review platform, the startup can host a wheelchair user's commentary that a local restaurant doesn't have accessible restrooms without worrying about being sued by the restaurant.

There are a few reasons why Section 230 is just a mechanism to quickly reach that inevitable outcome. One is that the First Amendment protects the vast majority of online expression that draws complaints. There are only a handful of narrow categories of content that are truly illegal, and those are already the spaces where tech companies invest significant time and money to find and remove problematic content. Another is that jurisprudence from before Section 230 was enacted recognized that intermediaries—including early Internet platforms but also pre-Internet intermediaries like bookstores—can't possibly know about and investigate everything every user says in a comment or everything every author writes in a book. And since that case law was developed, online content has grown astronomically. For example, more than eight hours of video content is

<sup>&</sup>lt;sup>1</sup> #StartupsEverywhere Profile: Brandon Winfield, Founder & CEO, iAccess Innovations, Engine (Apr. 29, 2022), https://www.engine.is/news/startupseverywhere-atlanta-ga-iaccesslife.

uploaded to YouTube every second.<sup>2</sup> That's just one site we all know, but there are tens of thousands of U.S. websites that host various types of user content. Just as courts recognized that it's unrealistic to expect bookstores to know what's on every page on their shelves, it's unrealistic to expect an Internet platform to, in real time, find and remove any user content that might give rise to legal liability, despite even a well-intentioned platform's best efforts.

And that gets at the core of why Congress created Section 230 in 1996. Congress saw the court decisions that found liability for platforms that moderated content<sup>3</sup> and found no liability for platforms that didn't moderate content.<sup>4</sup> Lawmakers didn't want a legal system that effectively disincentivized companies from engaging in content moderation efforts to keep their corners of the Internet safe, healthy, and relevant for their specific communities of users.

And that's what has happened. Of course, you may not like every content moderation decision that every platform has made. Everyone who has ever spent time on the Internet can rattle off a list of instances of platforms making what they see as the wrong call: content available online they believe should be removed, and vice versa. And for every one of those instances, there's an Internet user somewhere out there who feels the opposite.

But the legal framework created in 1996 still works across the Internet, far beyond platforms run by large tech companies. That includes everything from startups in Engine's network—like those that

<sup>&</sup>lt;sup>2</sup> Hours of video uploaded to YouTube every minute as of February 2022, Statista (June 2022),

https://www.statista.com/statistics/259477/hours-of-video-uploaded-to-youtube-every-minute/.

<sup>&</sup>lt;sup>3</sup> Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991)

<sup>&</sup>lt;sup>4</sup> Stratton Oakmont v. Prodigy, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)

build local communities through events,<sup>5</sup> create safer dating experiences,<sup>6</sup> facilitate conversation about current events,<sup>7</sup> support educators,<sup>8</sup> help small businesses find customers,<sup>9</sup> and more—to the non-profit-run Wikipedia, to libraries, to educational institutions, to Internet infrastructure companies, to individuals running Mastodon servers, or community listservs, or bloggers with comment sections.

Based on survey work and conversations with the startups in our network, we know that startups with limited budgets and small teams invest proportionally more in content moderation than their larger counterparts.<sup>10</sup> They have to; they need their corners of the Internet to remain safe, healthy, and relevant if they want to see the user growth they need to survive. But when it comes to making decisions about what user content to host, curate, amplify, moderate, and remove—an inherently fraught task, where every proactive decision is almost guaranteed to make someone unhappy—startups are doing more with less. They don't have the thousands of content moderators that large tech platforms employ. They're not building custom content detection and removal technologies. And while startups are able to use technological tools, including artificial intelligence, to help find potentially problematic content, the startups in Engine's network that host user content all say that human review is still a necessary component of their content moderation work.<sup>11</sup>

<sup>&</sup>lt;sup>5</sup> #StartupsEverywhere Profile: Andrew Prystai, CEO & Co-Founder, Event Vesta, Engine (Oct. 29, 2021), <u>https://www.engine.is/news/startupseverywhere-omaha-ne-eventvesta</u>.

<sup>&</sup>lt;sup>6</sup> #*StartupsEverywhere Profile: Heather Hopkins, Founder & CEO, Hulah*, Engine (Oct. 20 2023), https://www.engine.is/news/startupseverywhere-losangeles-calif-hulah.

<sup>&</sup>lt;sup>7</sup> #*StartupsEverywhere Profile: John Pettus, Founder and CEO, Fiskkit*, Engine (Dec. 11, 2020), https://www.engine.is/news/startupseverywhere-sanfrancisco-calif-fiskkit.

 <sup>&</sup>lt;sup>8</sup> #StartupsEverywhere profile: Jared Scherz, Founder & CEO, TeacherCoach, Engine (Aug. 27, 2021), https://www.engine.is/news/startupseverywhere-mount-laurel-nj-teachercoach.
<sup>9</sup> #StartupsEverywhere Profile: Roydon Jeffrey, Co-Founder & CEO, ListedB, Engine (Apr. 19, 2024),

https://www.engine.is/news/startupseverywhere-brooklyn-ny-listedb. <sup>10</sup> Startups, Content Moderation, & Section 230, Engine (Dec. 2021),

https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/61b26e51cdb21375a31d312f/1639083602320/St artups%2C+Content+Moderation%2C+and+Section+230+2021.pdf.

<sup>&</sup>lt;sup>11</sup> *Supra* notes 1, 5-10.

The fact that Section 230 is just a faster way to reach an inevitable legal conclusion—that Internet platforms aren't liable for the speech of their users—is especially important for startups and other small platforms, who are least equipped to handle the costs of litigation, even litigation that they ultimately win. The average seed-stage startup has about \$55,000 per month to cover all of its expenses, including salaries, equipment, research and development, customer acquisition, and much more.<sup>12</sup> Contrast that with the cost of defending against a lawsuit, which, even with Section 230 in place, can cost tens of thousands of dollars. Absent Section 230, that cost jumps into the hundreds of thousands of dollars, even if the startup were to ultimately win the lawsuit. Bringing a lawsuit rarely requires a large investment up front-plaintiffs often pay their attorneys a percentage of what they either receive from a settlement or what they win in court—but defendants have to start paying their attorneys on day one. This unique setup of the U.S. court system makes it much easier to bring a lawsuit and much more expensive to defend against one, which means it's usually the best option for a startup's bottom line to just avoid the lawsuit all together, even if that means removing user content it would otherwise host. As the founder of the accessibility review platform told us, "[I]t would hurt us a lot if we had to deal with legal action from companies that did not like a review they got. ... When that funding comes through the door we want to focus it on creating value for our [users]."<sup>13</sup>

We also tend to talk about Section 230 in the context of general audience social media companies, but it's important for much, much more than that. User content exists in all forms across the Internet: review websites, video games, discussion forums, comment sections, photo sharing apps,

<sup>&</sup>lt;sup>12</sup> The State of the Startup Ecosystem, 17 Engine (Apr. 2021),

https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/60819983b7f8be1a2a99972d/1619106194054/T he+State+of+the+Startup+Ecosystem.pdf.

<sup>&</sup>lt;sup>13</sup> Startup Spotlight on Content Moderation, Engine (May 2022), <u>https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/63c5c712ffddee3362c090b8/1673905938547/20</u> 22.06 Startup+spotlight+on+content+moderation.pdf.

video conference tools, and much, much more. And most platforms, as evidenced by just a sampling of Engine's network above, set out to serve a specific purpose for a specific community of users, so their content hosting and moderation practices can, and should, look different. Eliminating the framework created by Section 230 would nudge all Internet platforms into either avoiding content moderation to avoid knowledge or over-removal of user content to avoid hosting anything that might give rise to a lawsuit. That would make a platform like the accessibility review site significantly less useful to people who need that information to live their everyday lives.

Consider any "controversial" topic—an allegation that a restaurant isn't wheelchair accessible, religious beliefs, reproductive health, hunting gear, the #MeToo movement, political organizing on all sides, etc.—and you'll see the same consequence. If an Internet platform could be sued—or could be even threatened with a lawsuit—over the content created and shared by its users, the platform will have an incredibly hard time justifying hosting that content or anything that comes close. Not only does that put those platforms in the very difficult, expensive, and time-consuming position of having to find and remove user speech it might want to host, it means dramatically fewer places on the Internet where people can have all kinds of conversations.

In addition to startups needing Section 230, Engine also sees the benefit of user content online for another kind of entrepreneur: creators. In 2021, we launched our Digital Entrepreneur Project to tell the stories of the people who are making a living online creating content, telling stories, providing resources, selling goods and services, etc. For them, the Internet means they no longer need a book deal, a cable TV show, or to be distributed in a brick and mortar store to build an audience, community, and customer base of people around the world. Any changes to Section 230 should take into account not only the impact on platforms but also the impact on the entrepreneurs and small businesses that use these platforms.

Which brings me to the proposal of sunsetting Section 230. One of the biggest fears around something like the straightforward sunset proposed by the committee leadership is that it isn't clear that Congress can agree on a replacement. It's a compelling narrative to blame Big Tech for lawmakers' inability to reach a consensus on Section 230 reform outside of a few categories of problematic content (though there are valid arguments that even those proposals didn't have—or won't have—the intended consequences and have—or would have—unintended consequences on legal and productive user expression).

But the reality is that rewriting the entire framework that governs how Internet platforms host and moderate content would be a contentious and drawn out process. Members on opposite sides of the aisle disagree about what kind of user content Internet platforms should be encouraged to host and what kind of user content they should be encouraged to moderate. We saw senators filing dueling amicus briefs in the challenge to the Texas and Florida social media laws currently in front of the Supreme Court, with dramatically different ideas about whether Internet platforms should have to host certain political speech. In hearings and the press, we routinely see lawmakers talk past each other over what should be considered "misinformation" or content that's harmful to children. And with Section 230 set to sunset, the most vocal critics of the tech industry in Congress would have no reason to come to the table to negotiate.

That is why sunsetting Section 230 is the wrong approach to arriving at the outcome that leaders of this Committee say they want: making the Internet a place where "free expression, prosperity, and

innovation<sup>14</sup> can flourish. Section 230 is and has been critical to these goals, and it is essential for the competitiveness of U.S. startups. Instead of sunsetting Section 230 in hopes of an elusive replacement, we must be clear-eyed about what we can realistically accomplish and what we risk in terms of tradeoffs to expression, prosperity, and innovation. Thank you for the opportunity to testify, and I look forward to answering your questions.

<sup>&</sup>lt;sup>14</sup> Cathy McMorris Rodgers & Frank Pallone Jr., *Sunset of Section 230 Would Force Big Tech's Hand*, Wall St. J. (May 12, 2024), <u>https://www.wsj.com/articles/sunset-of-section-230-would-force-big-techs-hand-208f75f1</u>.